

USA

THE LESS THAN ONE PERCENT DOCTRINE

TEXAS SET TO EXECUTE ANOTHER
INMATE FOR CRIME COMMITTED AS
TEENAGER

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THE LESS THAN ONE PER CENT DOCTRINE

As it is understood by modern American society, the death penalty is neither cruel nor unusual. Whether this comports with the views of the international community is irrelevant. Therefore, any such allegation by [Anthony] Haynes is wholly without merit and should be dismissed
Texas Attorney General, brief in federal court, 2006¹

The death penalty in the USA, according to its Supreme Court, “must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.”² There have been more than 600,000 murders in the USA since 1977 and just over 1,300 executions.

The US death penalty could perhaps be called the “less than one per cent doctrine” – less than one per cent of murders result in execution, while the government acts as if the selection process is 100 per cent fair and reliable.³ Thus, reporting to the United Nations Human Rights Committee in December 2011, the US administration said:

“Heightened procedural protections apply in the context of capital punishment. Under Supreme Court decisions, a defendant eligible for the death penalty is entitled to an individualized determination that the death sentence is appropriate in his case, and the jury must be able to consider and give effect to any mitigating evidence that a defendant proffers as a basis for a sentence less than death.”⁴

That is the theory. The case of Anthony Haynes is another example of the reality.



Anthony Haynes, Texas death row, July 2012

© Melinda Martin

For the past 14 years, the State of Texas has been intending to kill Anthony Cardell Haynes for one of the more than 1,300 murders that occurred in Texas in 1998, namely the fatal shooting of Kent Dean Kincaid, an off-duty police officer, in Houston in May 1998. Anthony Haynes was aged 19 at the time of the crime. He was one of about 40 people sentenced to death in Texas in 1999, 19 of whom remain on death row. The state has set a time and a date to execute the now 33-year-old Anthony Haynes – 6pm on 18 October 2012.

Texas is no stranger to such killing, having conducted over one in three of all executions in the USA since they resumed in 1977 under revised state laws approved by the US Supreme Court in 1976. Neither would it be the first time Texas has executed an inmate who was a teenager at the time of the crime. Since 1985, it has killed more than 70 prisoners in its lethal injection chamber for murders committed when they were 17, 18 or 19 years old.

Because Kent Kincaid was killed in Harris County, the trial was held there. If asked to sum up the geographical disparity that marks the USA's death penalty, a person could do worse than respond "Harris County, Texas". Harris County has supplied Texas with more of its death row inmates than any other of the state's 254 counties. Only 10 states in the USA have sentenced more people to death since 1973 than this single local jurisdiction.⁵ More than 100 inmates currently on death row in Texas were sentenced to death in Harris County. Of the 486 people put to death in Texas since 1977, 116 were convicted in Harris County. If Harris County were a state, it would lie second only to the rest of Texas in total number of executions, beating Virginia into third place.

The current Harris County District Attorney has emphasised that the county covers "1,800 square miles and almost 4 million residents, a greater population than 24 US states".⁶ It could be added that more people convicted and sentenced to death in Harris County have been executed since 1977 than have been put to death in the whole of California, Colorado, Connecticut, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, South Dakota, Utah, Washington and Wyoming – *put together* – in the same 35 years. Between them, these 21 states have a population of around 140 million.⁷ Adding the dozen states which never reinstated the death penalty after the US Supreme Court invalidated existing capital statutes in 1972, more people convicted and sentenced to death in Harris County have been executed than have been put to death in 33 states, the combined population of which is around 175 million, compared to the four million in Harris County.⁸

Since Anthony Haynes was sentenced to death, numerous people have signed statements saying that his crime was shockingly out of character for a person they knew as non-violent and respectful. Many have said that, if asked, they would have been willing to testify at trial to his good character and their belief that he would not pose a future threat to society if allowed to live. A jury finding of so-called "future dangerousness" is a prerequisite for a death sentence in Texas, but Anthony Haynes' trial lawyers failed to offer a comprehensive challenge to the state's weak case for "future dangerousness".⁹ Moreover, the jury was not told that only two days before the shooting the defendant had taken crystal methamphetamine, or what effect it had had on him. Neither was there any expert testimony on his history of mental health problems or on the mitigating effect of youth. Indeed the prosecutor was able to argue to the jury that "no mitigation" had been presented and that anyway Anthony Haynes was "a dangerous predator that nothing can mitigate".

Perhaps the jurors were particularly receptive to the prosecutor's arguments. Research has shown that US capital jurors tend to be more pro-prosecution than those individuals excluded from serving on account of their opposition to the death penalty. Exacerbating this systemic juror narrowing, or "death-qualification", the prosecution peremptorily dismissed four prospective black jurors during jury selection, and the eventual jury had only one African American on it for this trial of a young black defendant charged with killing a white police officer. Examining this issue, a federal appeals court ruled in 2009 that Anthony Haynes should get a new trial or be released, but this decision was overturned by the Supreme Court.

The fact that the victim was a police officer allowed the state to seek the death penalty, as long as it could persuade the jury that he was acting in that role when he was shot even though he was off-duty, in plain clothes and in his private car. Again the state's task may have been made easier, this time because the jurors were constantly reminded of the victim's profession by the substantial numbers of uniformed police officers in the courtroom,

escorting and sitting with the victim's widow. The widow herself was put on the stand as the last of the witnesses at the sentencing, to provide "victim impact testimony", a form of evidence that can undoubtedly be powerful but which raises particular concern in the capital context given its potential to contribute to sentencing based on emotion rather than reason.

With his ordinary appeals to the state and federal courts exhausted, Anthony Haynes is asking the Texas Board of Pardons and Paroles and Governor Rick Perry to commute his death sentence to life imprisonment. On death row, Anthony Haynes is said to have been a model inmate and to have repeatedly expressed his profound remorse for the crime. Among those appealing for clemency is his father, a retired Assistant Chief Investigator with the Houston Fire Department. His appeal serves as a reminder of how the death penalty adds the suffering of the condemned prisoner's family to that of the relatives of the murder victim:

"The execution of my son, Anthony C. Haynes by the State of Texas will have a devastating effect on my whole life... Since Anthony is my only child, one of my main purposes for living will be taken away from me by his execution... I am asking you to spare my son's life, because I know the decisions he made as a teenager are not the decisions he has made as a man. My son is a changed person who has a heart of remorse for taking Sgt. Kincaid's life".

While Anthony Haynes is said by those who saw him in the days following the shooting to have been remorseful from the outset, one thing the State of Texas is not apologetic about is the death penalty. Responding in 2007 to a European Union call for a moratorium on executions, for example, Governor Perry's office responded, "Texans long ago decided that the death penalty is a just and appropriate punishment", and that "While we respect our friends in Europe, welcome their investment in our state and appreciate their interest in our laws, Texans are doing just fine governing Texas."¹⁰ In the face of Mexican and other governments' concern about international law-violating executions in Texas of foreign nationals denied their consular rights after arrest, Governor Perry said that "If people do not want to be executed in the state of Texas, they should avoid committing murder within the confines of our borders."¹¹

While not defensive about their use of the death penalty, the Texas authorities will aggressively defend their capital punishment system if necessary. After a Harris County judge ruled in 2010 that the state's death penalty was unconstitutional because it risked the execution of people for crimes they did not commit (an inescapable flaw of the death penalty)¹², a storm of official condemnation ensued. Governor Perry described the ruling as an example of an "activist judge legislating from the bench" and a "clear violation of public trust".¹³ The Texas Attorney General responded to this "unabashed judicial activism" by announcing that his office had immediately "offered to provide help and legal resources to the Harris County District Attorney's Office" to fight the decision and would itself "take appropriate measures to defend Texas' capital punishment law."¹⁴ The judge withdrew his ruling less than a week later and said he would conduct an evidentiary hearing.¹⁵ After the hearing began, the Texas Court of Criminal Appeals (TCCA) agreed with the state that the judge was "acting beyond the scope of his lawful authority" and ordered the hearing halted.¹⁶ The Harris County District Attorney applauded the decision which she said would allow "the administration of justice" to "move forward".¹⁷ Texas justice has meant 22 executions in the 21 months since then, and more than a dozen new inmates sent to death row, including three from Harris County.

Some of the tinkering around the edges of the death penalty over the years provides further insights into the culture of capital justice in Texas, against which backdrop clemency is a rarity. In 2005, for example, Governor Perry signed a bill amending the terminology used on death certificates for executed inmates from "homicide" to "judicially ordered execution." Executed inmates "are not victims", the Governor reasoned, "they are criminals and the final document that bears their name should reflect this fact."¹⁸ Six years later, Texas dropped its

practice of allowing condemned inmates a special “final meal” request before execution. This followed the Chair of the state Senate Criminal Justice Committee complaining to the Executive Director of the Texas Department of Criminal Justice about the excessiveness – not of the killing by the state – but of the final meal ordered by an inmate.¹⁹

Meanwhile, as executions continue, the USA assures the rest of the world of its commitment to human rights:

“The story of the United States of America is one guided by universal values shared the world over – that all are created equal and endowed with inalienable rights. In the United States, these values have grounded our institutions...to come ever closer to realizing these ideals... The American experiment is a human experiment; the values on which it is based, including a commitment to human rights, are clearly engrained in our own national conscience, but they are also universal.”²⁰

Mythologizing about national institutions and domestic values can hinder human rights progress. The fact is that in a clear majority of countries around the globe, Anthony Haynes would not be facing execution. Most governments have stopped using the death penalty against anyone, let alone a teenaged offender with no prior criminal record.

Anthony Haynes is being subjected to a punishment that is not only cruel but highly selective. The basic question relating to the selection process, Supreme Court Justice Harry Blackmun noted in 1994, is “does the system accurately and consistently determine which defendants ‘deserve’ to die?” The answer was clearly no, he wrote, and announced that he would no longer “coddle” the “delusion” that capital justice was or could be fair.²¹ He was effectively joined in 2008 by Justice John Paul Stevens. After more than three decades on the Court, Justice Stevens had concluded that, with only “marginal contributions to any discernible social or public purposes”, the death penalty was “patently excessive and cruel.”²² Executions amount to the “pointless and needless extinction of life”, he wrote.

Arguing for the death penalty for Anthony Haynes in September 1999, the Harris County prosecutor described his crime to the jury as “cold-blooded, senseless, [and] merciless”. The question 13 years later is whether the State of Texas will conduct its own cold-blooded, senseless killing in retaliation or whether it will show the prisoner mercy.

THE THEORY OF SELECTIVE KILLING; DETERRENCE AND ‘JUST DESERTS’

Like the vast majority of Texans, I believe the death penalty is an appropriate response for the most violent of crimes against our fellow human beings. In fact, I believe capital punishment affirms the high value we place on innocent life because it tells those who would prey on our citizens that you will pay the ultimate price for their unthinkable acts of violence
Texas Governor Rick Perry, January 2001²³

Eight and a half decades ago, a US Supreme Court Justice wrote: “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”²⁴ One example set by state and federal authorities in the USA over the past four decades is that killing a selection of prisoners convicted of killing is a legitimate and constructive policy under the theory of “retribution and the possibility of deterrence of capital crimes by prospective offenders”.²⁵ A brief moment of hope in the early 1970s that the USA would end this policy was dashed by legislators around the country, including in Texas.

In late June 1972 the Supreme Court ruled that the capital law then on the statute books in Texas was unconstitutional. *Branch v. Texas* was one of the consolidated cases making up the *Furman v. Georgia* ruling that ended the death penalty as then applied in the USA.²⁶ Texas was among the states which quickly moved to revise their capital laws. Four years after *Furman*, in *Gregg v. Georgia*, the Supreme Court gave the go ahead for executions to resume

under these revised laws, adding that “legislative measures adopted by the people’s chosen representatives weigh heavily in ascertaining contemporary standards of decency”.²⁷

The revised Texas law provided for the imposition of the death penalty upon the jury’s finding of certain “special issues”, including: “is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?”, the so-called “future dangerousness” question. Reviewing the Texas law in 1976, the US Supreme Court decided that “by narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered.”²⁸ The fact that Kent Kincaid was a police officer was what made his murder potentially a capital offence.

While approving the Texas statute on the grounds that it limited the types of murder that could result in the death penalty, the Supreme Court also held that the jury must be able to consider mitigating factors before sentencing. It upheld the Texas law on 2 July 1976, the same day as the *Gregg* ruling.²⁹ The revised Texas law did not expressly address the matter of mitigating evidence in the “special issue” questions put to the jury. In 1989, the Supreme Court held that the Texas scheme was in practice deficient in this regard.³⁰ Since 1990, as a result of this ruling, Texas capital jurors have been asked to consider another “special issue” before deciding whether the defendant should live or die:

“Taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, is there still sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?”

The shooting of Kent Kincaid was one of approximately 17,000 murders committed in the USA in 1998, about 1,350 of which occurred in Texas (the figures were similar in 1999).

Anthony Haynes was one of 294 people sentenced to death in the USA in 1999. By the end of 2010, 40 of them had been executed and some 167 others remained on death row, the rest having either died (10) or had their convictions or death sentences overturned or commuted.

Proponents of the USA’s death penalty have argued that this attrition in figures – the small percentage of murders ending in death sentences, and the even smaller percentage that result in execution – is a sign of a system selecting the “worst of the worst” for the ultimate punishment and that it does this in a reliable, accurate and consistent way. Defending the death penalty against Anthony Haynes, the State of Texas asserted in federal court in 2006:

“the Texas scheme both genuinely narrows the class of death-eligible defendants, thus guarding against arbitrary and capricious imposition of the death penalty, and provides for individualized sentencing based on the character of the individual and the circumstances of the crime.”³¹

In practice, however, the US capital justice system is riddled with inconsistency, discrimination and error. In Texas, those labelled as the “worst of the worst” and killed in its death chamber have been prisoners with histories of serious mental illness; those assessed as having intellectual disabilities (“mental retardation”); those whose guilt remained in serious doubt; those who were remorseful or rehabilitated; dozens of offenders who were teenagers at the time of their crimes; prisoners who had inadequate legal representation at trial or during appeal or where race appears to have played a part.³²

All this has been conducted without proof of any special deterrent effect, one of the purported justifications for this lethal policy. The *Gregg* ruling allowed states to resume executions despite acknowledging that the deterrence evidence was “inconclusive”. Over

three decades later, in 2008, one of the Justices who had voted for the *Gregg* ruling, Justice John Paul Stevens, returned to this issue:

“Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.”³³

Anthony Haynes was born on 22 January 1979, by which date there had been one execution in the USA since the *Gregg* decision. By the time he turned 18, some 361 prisoners had been executed across the country; 107 of them in Texas. Texas executed 45 prisoners in the time between Anthony Haynes’ 18th birthday and the shooting of Officer Kincaid in Houston 14 months later, an average of one execution every 10 days. Two of these executions – of individuals who were 17 and 20 years old at the time of the crimes of which they were convicted – took place in Texas in the four days before the murder of Kent Kincaid on 22 May 1998.³⁴ The younger of the two men executed had been convicted in Harris County.

It might be thought that if ever the death penalty were to have a deterrent effect, it would be in situations of temporal and geographical proximity to actual executions. Of course, as US Supreme Court Justice William Brennan wrote in 1972, the theory of the death penalty’s deterrence assumes a rational, knowledgeable actor:

“The more significant argument is that the threat of death prevents the commission of capital crimes because it deters potential criminals who would not be deterred by the threat of imprisonment... The States argue that they are entitled to rely upon common human experience, and that experience, they say, supports the conclusion that death must be a more effective deterrent than any less severe punishment. Because people fear death the most, the argument runs, the threat of death must be the greatest deterrent... [T]he argument can apply only to those who think rationally about the commission of capital crimes... The concern, then, is with a particular type of potential criminal, the rational person who will commit a capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death. On the face of it, the assumption that such persons exist is implausible.”³⁵

Clearly the threat of the death penalty did not stop the shooting of Kent Kincaid. Here the gunman was a teenager who had recently taken crystal methamphetamine, a potent drug that interferes with an individual’s decision-making ability. A friend of the family has related how it was he who “introduced Anthony to Crystal Meth”. In his sworn statement signed in 2005, he recalled:

“Anthony asked for the Meth two days before the murder... I learned at that time that Anthony had taken the Meth and was acting weird and talking crazy... Anthony had told me that a few days before the murder that he had been ‘jacked’ in his car by someone driving a jeep. It really scared him. After taking the Meth, Anthony called me at 5am in Dallas talking crazy about wanting a gun because he was being followed again by a jeep... Within 2 days before the murder I am not sure how much Crystal Meth Anthony had ingested, but I know through people that were around him...that he had not slept at all and was acting very paranoid and talking about being followed...

I was never asked to testify and if I had [been] I would have. This was the drug, not Anthony, and I feel so responsible for placing Anthony in the position that brought him to this situation that he is in today.”³⁶

The jury which sentenced Anthony Haynes to death never knew that he had taken this drug for the first time in his life just two days before the crime, or what effects it might have had on him. In 2005, a Houston medical doctor specializing in the field of psychiatry and with more than a decade of experience as psychiatric consultant to a residential treatment centre

for inner city youth, interviewed Anthony Haynes and reviewed his medical, school and other records. He concluded:

“Records indicated that Mr Haynes manifested many of the symptoms of MA [Methamphetamine] intoxication during the period when he committed the robberies [see below] and fired his gun. His behaviors were much more aggressive than his previous behaviors, and his behaviors did not appear to be well thought out or well planned. His aggressive behaviors are consistent with a reaction to a misperception or distortion of information. Otherwise stated, his diminished capacity, in all medical probability, was due to his voluntary use of MA.”³⁷

Neither was the jury presented any expert evidence on the mitigating effects of youth, a stage of life that impairs rational thinking – one of the reasons why the US Supreme Court in 2005 outlawed the death penalty against offenders who were under 18 at the time of the crime, while noting that “the qualities that distinguish juveniles from adults do not disappear when an individual turns 18” (see further below).

“If the death penalty is not a deterrent, and it is not”, wrote a Florida judge in 2012, “and if the death penalty does not make us safer, and it does not, then it is only high-cost revenge.”³⁸ On the question of retribution as a purported justification for the death penalty, Justice Brennan wrote in the 1972 *Furman* ruling:

“The infliction of death, the States urge, serves to manifest the community’s outrage at the commission of the crime. It is, they say, a concrete public expression of moral indignation that inculcates respect for the law and helps assure a more peaceful community.... If capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when death is so rarely inflicted upon the criminals who commit the crimes. Furthermore, it is certainly doubtful that the infliction of death by the State does in fact strengthen the community’s moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values.”

Dissenting four years later from the Supreme Court’s decision to allow executions to resume in Texas and elsewhere, Justice Thurgood Marshall wrote that “the taking of life ‘because the wrongdoer deserves it’ surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer’s dignity and worth.”

Respect for human dignity and human rights principles, and carrying out their functions impartially, are among the obligations on prosecutors under international standards in order that they contribute to “due process and the smooth functioning of the criminal justice system”.³⁹ Inconsistent with this requirement, the lead prosecutor at Anthony Haynes’ trial personally vouched for the state’s case. In the final arguments before the jury retired to deliberate on guilt or innocence, he said, “I strongly believe in this case”. The defence objected, and the judge sustained the objection, but the prosecutor persisted in personalizing the case: “Ladies and gentlemen, I wouldn’t be standing before you if I didn’t believe the defendant committed this offence”. Again the judge upheld the defence objection. The prosecutor was still not to be swayed: “Because it would be hypothetically critical if I didn’t come in here neutral. I want you to know where I am coming from. I didn’t come in here neutral. It would be the same if a family member of yours....” Again the judge sustained the defence objection, but denied a defence motion for mistrial.

“It is of vital importance to the defendant and to the community”, wrote the US Supreme Court in 1977, “that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”⁴⁰ As outlined in this report, there were other troubling aspects to the Anthony Haynes trial that leave at least the appearance of injustice – other arguably inflammatory comments by the prosecutors, their removal of African American jurors during jury selection, and the large police presence in the courtroom throughout the trial.

Another claim raised on appeal was that the trial judge had displayed bias against the defence, particularly, as described below, when he had threatened the defence lawyer with removal from the courtroom after he sought a ruling on his objection to a prosecutorial argument. Another disturbing aspect to this case is the fact that the judge who oversaw the individual questioning of prospective jurors (not the ultimate trial judge) had been cleaning two guns while doing this, in full view of the jurors. Two years after the trial, this judge was reprimanded by the Texas State Commission on Judicial Conduct which found that he had “disassembled and reassembled two revolvers” during jury selection at the Haynes trial.⁴¹ No relief was forthcoming for Anthony Haynes, however. In 2011, the US Court of Appeals for the Fifth Circuit said that “such behaviour is not commendable” but upheld the death sentence.

“I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance”, wrote Justice Marshall in the *Furman* ruling 40 years ago.

The Texas clemency authorities should ask themselves – what purpose would the execution of Anthony Haynes serve?

MAKING THE CRIME PUNISHABLE BY DEATH

It is up to the jury to decide whether they believe Haynes' unlikely assertion that Sergeant Kincaid was acting as a private motorist concerned about the damage to his vehicle rather than discharging his official duty to investigate a possible violation of the law
Texas Attorney General, brief in federal court, 2006⁴²

At around 10.30pm on 22 May 1998, off-duty Houston police officer Sergeant Kent Kincaid, aged 40, and his wife left their home to go and meet friends in a bar. On the way, an object hit and cracked their car windscreen. Kent Kincaid turned his car around and followed the pick-up truck from which he thought the object, perhaps a rock, had been thrown. When the truck stopped a few blocks later, Sergeant Kincaid pulled up, got out of his car and approached the other vehicle. As he confronted the driver, and reached into the back pocket of his jeans, a shot was fired at him. The bullet hit him in the head. An ambulance was called, but he was declared brain-dead upon arrival at hospital just before midnight. After his organs were taken for transplantation, he was pronounced dead at 2.34am on 23 May 1998.

In the pick-up truck, which was registered to Anthony Haynes' father, was the 19-year-old Anthony Haynes and two teenaged friends.⁴³ According to the evidence at trial, prior to the shooting, they had decided to steal money. Under the pretence of asking for directions, they called pedestrians over to the car and then demanded their wallets at gunpoint. Three such robberies were attempted – in two instances the person ran off, while the other person handed over his wallet. No shots were fired, and the individuals who ran away were not pursued. Then, as he was driving the pick-up, Anthony Haynes fired a shot into the air. It was this bullet that hit the Kincaid's vehicle, triggering the series of events that resulted in Anthony Haynes ending up on death row for the murder of a police officer.

Anthony Haynes was arrested on 24 May 1998 and after waiving his rights to have a lawyer present and to remain silent, he confessed to the shooting in the early hours of 25 May. In a first statement, recorded on audio tape, the teenager said that he was afraid of being caught with a gun, and that he had pulled the trigger. In a second statement, also recorded, he said that he had not meant to kill, but that the gun just went off. In each statement, the 19-year-old said that the man had said he was a police officer. This was the part that was essential to the state's case.

Anthony Haynes was charged with capital murder – the murder of a police officer who was “acting in the lawful discharge of an official duty”. The charge sheet dated 25 May 1998 stated that Anthony Haynes knew at the time of the shooting that Kent Kincaid “was a peace officer”. Anthony Haynes has maintained that he did not know that Sergeant Kincaid was a

police officer, and that his recorded statements to the contrary were the product of coercion. At the trial, his lawyers sought to have the statements suppressed as involuntary and unreliable, but the motion was unsuccessful and both statements were played to the jury.

This issue was raised on appeal, and the TCCA ruled that the trial judge had not been wrong to allow the statements into evidence. In federal court, Haynes' lawyer argued:

“Petitioner, aged nineteen, did not eat anything during the course of or prior to his interrogation, was not afforded an opportunity to use the restroom, was not provided the opportunity to call his father despite frequent requests, and was extremely fatigued. Also, he was under the influence of methamphetamine. Under these circumstances, [he] was unable to knowingly waive his rights against self-incrimination”.

The federal court rejected the claim. If Kent Kincaid had not been a police officer deemed to have been acting in the discharge of his official duty at the time that he was fatally shot, Harris County prosecutors could not have pursued the death penalty under Texas law. It was undisputed that he was off-duty at the time he was shot – and had been off-duty for the whole of that day – and that there was nothing in his appearance to indicate that he was a police officer. He was unarmed at the time.

To show that he was acting in an official capacity when he had confronted the driver of the pick-up, the prosecution presented testimony from Mrs Kincaid who testified that her husband had said he was a police officer when he asked to see the driving licence of the suspect. She testified that when he reached into his back pocket, presumably to show his identification, the driver of the car had shot him. Her husband had not yet shown his identification when he was shot. She said that the whole incident took less than a minute.

An assistant police chief testified that off-duty Houston Police Department officers were required to investigate any violation of the law committed in their presence. She said that she had concluded from the police report that Officer Kincaid had been performing an official duty when he confronted Anthony Haynes. Questioning this witness, the lead prosecutor said:

Prosecutor: Would it be safe to say he went off duty permanently the minute he was shot in the head?

Witness: Yes, sir, on that particular day, yes.

The defence lawyers made no objection to the prosecutor's inflammatory question.

After the prosecution had presented its witnesses at the guilt phase, the defence asked for a judgment of acquittal on the grounds that whether the victim had been acting as a police officer or a private citizen when he was shot was unclear. The judge denied the motion. The defence called no witnesses at the guilt stage and proceedings moved into final arguments at which the prosecutor pursued the on/off-duty question:

“Did anyone come in here and say he was not on duty? Have you heard anybody come in here and say Sergeant Kincaid was not on duty? Not one. And I say if somebody was around can say it, don't you know they would have been in here? Those are two very bright lawyers. Do you think that they would have let that chance slip by?”⁴⁴

The jurors were unlikely to forget Kent Kincaid's profession while they considered whether his murder qualified for the death penalty under Texas law. There were numerous uniformed officers of the Houston Police Department in the courtroom. The defence did not raise any objection to their presence. According to Anthony Haynes's mother:

“During the trial, the victim's family were identifiable by decorative jewellery, round pins that they wore. The victim's wife was always escorted by police officers and they sat with her and her family at the trial. There were 6 to 8 family members at the trial most days, in two rows, and usually close to a dozen uniformed police officers. I felt like they were

trying to intimidate the jury”.⁴⁵

An uncle of the defendant has similarly stated:

“I sat through the trial and only missed one or two days.... There were a lot of police officers in uniform with weapons at the trial. At least eight were there every day, surrounding the victim’s widow. Other officers were standing along the wall”.⁴⁶

A friend of the Haynes family who attended two days of the trial recalled that the six to eight uniformed police officers she saw each day had “black tape on their badges”.⁴⁷ Another family friend present at most of the guilt phase recalled that on the day of the guilty verdict, there were between one and two dozen uniformed officers in the courtroom.⁴⁸ Another family friend, who testified at the trial, has said that on the day of the sentencing there had been about 20 uniformed officers, whose badges had black ribbons across them.⁴⁹

The jury was given the choice of finding Anthony Haynes guilty of murder or of capital murder. If the jurors had chosen the former, the death penalty would not have been an option. On 17 September 1999, however, they convicted Anthony Haynes of capital murder, under Section 19.03(a)(1) of the Texas Penal Code, which states that a person commits capital murder if he or she “murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman”.

The trial moved into a sentencing stage at which various witnesses were presented (see further below). As described further below, the jury was never presented at the sentencing with any expert testimony about the mitigating effects of youth, despite the fact that Anthony Haynes was only 19 at the time of the crime. Dr Mark Cunningham, a clinical and forensic psychologist who is a recognized expert on sentencing determination issues, has assessed the case history of Anthony Haynes. He pointed to aspects of the crime illustrating the immaturity of those involved:

“First, there was an aimless and shifting plan for the evening’s activities, which did not initially contemplate criminal activities. Second, the offenses are committed in the presence of two male peers, one of whom initially indicated a willingness to participate in the armed robberies and one who was simply along as an observer. This is a classically adolescent pattern of behaving as, or in the company of, a group. Adolescents define themselves, their identity, and the meaning of their behaviour and relationships by how their peers perceive and react to them. They live their life in the group. Thus Anthony engaged in armed robberies in a group setting, even though the presence of his two peers created witnesses, might require a distribution of the proceeds, and dramatically increased the likelihood of eventual apprehension”.

Dr Cunningham also noted that within hours of the crime Anthony Haynes had telephoned an adult mentor and an adolescent friend to tell them about what had happened, reflecting a “need to disclose” that “is typical of adolescent processing of a disturbing event”. This was not, Dr Cunningham suggested, the action of “a cool, hardened killer”, as the prosecution had portrayed Anthony Haynes to the jury.

In 2005, the young friend Anthony Haynes had contacted after the crime signed a sworn statement recalling that time:

“He contacted me by phone shortly after the incident occurred and clearly demonstrated signs of distress, anxiety and fear... I spoke to him again on the next day by phone and in person at my home. He appeared very shaken and regretful for what had occurred the night before... We both were very young and had little idea of what to do or who to go to and were both very scared. It was just two days later that Anthony was arrested and charged.

I felt that the charge and the way they depicted Anthony in the media was skewed and

partial. They played him out to be a common thug with no direction and no goals, someone who was out looking to be a nuisance to society and a troublemaker. Anthony was none of these... I know Anthony would not be a threat in jail (general population) nor to society at large.”⁵⁰

This friend said she would have testified at trial if she had been asked, but that she had not been. Neither was another friend who also met Anthony Haynes the day after the shooting. She has said that she attended the trial every day, “thinking that I was going to be a witness. The attorneys never asked me to testify”. In a sworn statement given in 2005, she recalled:

“The day after the incident, Anthony showed up at my house. He was scared and did not know what to do. Someone turned on the Channel Two News and his picture was on. Anthony said he had shot someone and said he had done some things with other people first. In these other incidents, he said he did not point the gun at them, but they saw it. Regarding the incident when he shot someone, he said the man was reaching for something in his back. Anthony also said the person was cursing and calling him names. Anthony also said he was trapped by the guy who was cursing up a storm. As soon as the person walked up, Anthony said his voice got louder and Anthony said he felt that he was going to be grabbed or dragged out of his vehicle. The man’s hand went to his back and Anthony felt he had to protect himself. As soon as the gun went off, Anthony said he was in shock. Anthony said he was sorry and remorseful. He told me all of this the next afternoon, when I was life-guarding at a local pool. I told him to go to the police.”⁵¹

According to his clemency petition, Anthony Haynes has accepted full responsibility for the shooting and the death of Kent Kincaid, but maintains that at the time he did not know that he was a police officer.

In an email to Amnesty International in late September 2012, with her son’s execution less than three weeks away, Anthony Haynes’ mother wrote:

“Anthony’s faith during this difficult time is amazing. I have no doubt that his current attorney is doing everything to stop this senseless execution. In my opinion, Anthony did not deserve death. The officer did not follow protocol. But that’s history. All we have is faith at this time. I feel for the family of Sergeant Kincaid, but killing my son does not solve anything.”

‘DEATH-QUALIFYING’ THE JURY, AND REMOVING AFRICAN AMERICANS

The process of obtaining a ‘death qualified jury’ is really a procedure that has the purpose and effect of obtaining a jury that is biased in favour of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive
US Supreme Court Justice John Paul Stevens, 2008⁵²

In a state capital trial in the USA, 12 citizens from the county in which the trial is held (the county where the crime is committed unless a change of venue is granted) are selected to sit as a “death qualified” jury. The defence and prosecution will question the prospective jurors and have the right to exclude certain people, either for a stated reason (“for cause”) or without giving a reason (a “peremptory challenge”). Those citizens who would be “irrevocably committed” to vote against the death penalty can be excluded for cause by the prosecution, under the 1968 Supreme Court ruling, *Witherspoon v. Illinois*.⁵³ In 1985, in *Wainwright v. Witt*, the Court relaxed the *Witherspoon* standard, thereby expanding the class of potential jurors who could be dismissed for cause.⁵⁴ Under the *Witt* standard, a juror can be dismissed for cause if his or her feelings about the death penalty would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath”. In 1987, the US Supreme Court ruled that a death sentence must be reversed even if only one

juror has been improperly excluded from serving on the jury.⁵⁵

In 1986, the Supreme Court acknowledged evidence from research that the “death qualification” of capital jurors “produces juries somewhat more ‘conviction-prone’ than ‘non-death-qualified’ juries”.⁵⁶ The Court had been presented with 15 published studies each finding that death-qualified jurors were more conviction-prone than excludable jurors. Three Justices referred to this “overwhelming evidence that death-qualified juries are substantially more likely to convict or to convict on more serious charges than juries on which unalterable opponents of capital punishment are permitted to serve”, adding that “death-qualified jurors are, for example, more likely to believe that a defendant’s failure to testify is indicative of his guilt, more hostile to the insanity defence, more mistrustful of defence attorneys, and less concerned about the danger of erroneous convictions”.⁵⁷

Whether at Anthony Haynes’s trial the jurors took a negative view of the fact that he did not testify is unknown. Anthony Haynes himself has said that he wanted to testify. In an affidavit signed a year after the trial, he said:

“Everyone who I talked to before the trial knew that it was my wish to testify, and all they ever told me was to keep my cool. I even went so far as to ask my attorneys to let me know the type of questions to expect so as not to be surprised by the district attorney. I should have known that something was very wrong because my requests were ignored. After the state rested in this [guilt/innocence] phase of my trial and it was the defense’s turn to tell its side, my attorney told me that I did not need to take the witness stand. I asked why not and was given the reason that the state did not prove its case and did not meet its burden of proof. Because of this, he said, I would do more harm than help. I questioned him more and he told me to trust in him. I did as told and then the defense rested. Now, here I sit on death row, knowing that my testimony would have saved me from this fate. I wanted so badly to tell my side of the story to the court and jury”.⁵⁸

While Anthony Haynes has said that in his opinion his trust in his lawyers was misplaced, if the “death qualified” jurors at his trial were themselves more distrustful of defence lawyers than their excludable counterparts, this phenomenon is unlikely to have been ameliorated by a particular instance that occurred as the prosecutor was arguing for the death penalty. The lead defence lawyer objected when the prosecutor suggested to the jurors that because prior to shooting Kent Kincaid, Anthony Haynes had tried to rob passers-by at gunpoint, the jurors would forever fear a person who came up to ask them directions. The prosecutor pursued this line of argument, and the defence objected. The following dialogue then occurred:

Prosecutor: You know your whole life is going to be changed by this trial. You know-

Defence: I’m going to object to that comment too, your Honor, that their whole life is going to change. That’s improper jury argument. That’s him personalizing with the jury, which is outside the record and improper argument.

Judge: It’s overruled.

Prosecutor: Thank you, Judge. Could I have additional time to continue due to argument?

Defence: Your Honor, I’m going to have to object to his sidebar remarks.

Judge: Have a seat. Have a seat. Have a seat.

Defence: Your Honor, can I have a ruling on my objection?

Judge: I said sit down, Mr Nunnery.

Defence: Your Honor, I’m required by law to ask for a ruling for [sic] objection.

Judge: You have one second to sit down or I'll remove you from the courtroom. Do we understand each other?

Shortly after that, the prosecutor told the jury "And you and I both know that Kent Kincaid would be alive today if he hadn't uttered those fateful words" that he was a police officer. The defence lawyer did not object to this statement, and in fact made no further objections during the closing arguments at the sentencing.

After the jury was dismissed, at a hearing on a motion for a new trial, the lawyer said that in his 15 to 17 years of practice as a lawyer he had never been threatened with removal from the courtroom, that he had felt "degraded and humiliated" by the judge's threats in this case, and that he had protected himself from further humiliation by declining to make further objections to what he saw as improper prosecutorial comments. The motion was denied by the judge. In an affidavit signed in October 1999, the month after the trial, the lead lawyer (himself an African American) stated his belief that:

"the Court's overall contempt for the defense and its angry admonitions were a not too subtle appeal to prejudice and racism; it was quite clear to me that when he told me to sit down, the real message was 'boy' sit down! I particularly felt hostility from the jury after the Court's rebuke of my professional actions as I attempted to present my closing arguments before the jury and as I pled for my client's life. The hostility was manifestly obvious in the eyes of the jurors as I gave my closing arguments".⁵⁹

In 2001 the Texas Court of Criminal Appeals rejected the claim of judicial bias, ruling that "the harsher effects of the [trial judge's] ruling were inadvertent."

Eight years later, it briefly looked like Anthony Haynes might get a new trial on another issue, namely a claim of racial discrimination by the prosecutor during jury selection.

Under the 1986 Supreme Court ruling *Batson v Kentucky*, prospective jurors can only be removed for "race neutral" reasons.⁶⁰ If the defence makes a *prima facie* case of discrimination by the prosecution during jury selection, the burden shifts to the state to provide race neutral explanations for its peremptory dismissal of black jurors. As Justice Marshall wrote in 1990, "*Batson's* greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors... This flaw has rendered *Batson* ineffective against all but the most obvious examples of racial prejudice".⁶¹ Prosecutors simply have to come up with a vaguely plausible non-racial reason for dismissing a minority juror.

At Anthony Haynes' trial, there were 50 individuals in the original jury pool. Seven of them were African American, six of whom appeared on the day for jury service (12 per cent of the jury pool compared to around 19 per cent in population at large). The prosecution peremptorily struck four of the six. The eventual jury had one African American on it. The defence made a "*Batson* challenge", and the judge ordered the state to give its reasons for each of its peremptory challenges against the black prospective jurors. The prosecution gave its reasons, reasons that emphasised the demeanour of the would-be jurors in question:

"...the State exercised a strike for Ms Kirkling because, during her interview, she said capital punishment was a last resort, meaning several times she hesitated in responding to the questions about the death penalty. She never would give a firm conviction, Your Honour. For that purpose, I did not trust her..."

She looked at capital punishment, she said she sees it as a necessary evil. I felt that it meant indication that there is something impermissible about having such punishment available to the State. She further avoided giving any direct position on capital punishment that it was a viable object for the State and, furthermore, she state that life, 40 [years], is a justifiable punishment. And for that, since she had a preconceived notion toward capital punishment, we exercised our strike".

The defence argued that the state had accepted other, non-black jurors, who had “articulated the same view that capital punishment is a necessary evil”.

On the second black prospective juror, the prosecutor explained:

“Ms Goodman during – again, these are my impressions of the interview. I think I have a right to have that impression. She opposed death punishment. She refused to answer questions about capital punishment. She reluctantly agreed that capital punishment for police officers should be available. She also demonstrated through her demeanour that she was very anti-capital punishment and I have picked a number of capital jurors and I did not trust this juror”.

The defence made no objection. On the third juror, the prosecutor said:

“And where Mr McQueen, again, when questioned, Mr McQueen would give me all the indications that in responses to my questions by the language of demeanour [sic] that he was very weak on the death punishment and did not – and stated that there were some cases that I could not give a death sentence even if the law permitted such and again I struck him as well”.

The defence lawyer noted that on his questionnaire, this juror had indicated his support for the death penalty. For the fourth juror [Ms Owens], the defence said much the same after the prosecutor had explained his reason for removing her, which was:

“During the interview, this lady’s demeanour was one, I guess, the best I can describe it, somewhat humorous. She never did really take on a serious attitude during the interview. She would say one thing but her body language would indicate that this is not her true feeling. And I’m sure [the defence] reasonably expected us to strike this lady after she was interviewed because I think [the defence questioned] her and he only talked to her for a very short time because he was very pleased with the things she said, more as she was leaning toward them. If the defendant was found guilty, she would certainly be leaning toward a life sentence. And with that, I drew a conclusion in my mind, based on my observation, that she already had a predisposition and would not look at it in a neutral fashion”.

On each case, the trial judge ruled, without further comment, that the prosecution’s explanations had been race neutral. This was not the judge who had actually overseen the questioning of the individual jurors, however. This had been conducted by the pistol-cleaning Judge Lon Harper, noted above.

The question arose, then, as to how the judge, Judge James Wallace, adjudicating the *Batson* claim could assess the state’s reasons when he had not been there to observe the demeanour, body language and attitudes that the prosecutor claimed was why the four blacks had been dismissed. On appeal, the US District Court ruled: “While it would be useful to have the same judge who viewed the prospective jurors’ demeanor, facial expressions, and attitude rule on *Batson* issues, Haynes has not shown that the Constitution requires it”.

In 2009, a three-judge panel of the Fifth Circuit Court of Appeals overturned the District Court ruling. It made a compelling case that Supreme Court precedent demanded relief:

“The Supreme Court demands that the trial court especially scrutinize explanations based purely on demeanor. This demand is logically derived from the underlying rationale for delegating the *Batson* determination to a trial court and according it substantial deference – namely that the trial court is better able to make determinations of demeanor... It is clearly established that the cold record cannot accurately reveal the demeanor of live trial participants. Therefore, no court, including ours, can now engage in proper adjudication of the defendant’s demeanor-based *Batson* challenge as to prospective juror Owens because we will be relying solely on a paper record and would

thereby contravene *Batson* and its clearly-established ‘factual inquiry’ requirement”.

Because it made this finding in relation to one of the would-be black jurors, the court did not rule on the others. It ordered that Anthony Haynes be granted a new trial or be released.

The State of Texas appealed to the US Supreme Court. In 2010, the Court overturned the Fifth Circuit’s decision, saying that if it were allowed to stand, it would have “important implications”. The Court said that the Fifth Circuit had read too much into the Supreme Court’s precedents and that “no decision of this Court clearly establishes the categorical rule on which the Court of Appeals appears to have relied”. The case was sent back to the Fifth Circuit, which in 2011 duly upheld the death sentence, even while stating that “the circumstantial indications of intentional racial discrimination in this case” had “some persuasive value”. In 2012, the US Supreme Court refused to intervene.

Whether or not the prosecutor’s peremptory strikes were racially motivated or aimed at ensuring as lethal a jury as possible, there is no getting away from the appearance of discrimination in this case or the wider question of race in the US death penalty. In 2008, the then most senior Justice on the Supreme Court, Justice Stevens, noted that race continued to influence capital sentencing, with cases involving white victims, particularly if the accused is black, more likely to end in a death sentence than other cases.

Before the *Roper* ruling in 2005 ended the use of the death penalty against people who were under 18 at the time of the crime, since 1982 Texas had executed 13 prisoners who were 17.⁶² Eight of these 13 were African American, six of whom were executed for killing whites. At least another 59 individuals have been put to death in Texas since 1982 for crimes committed when they were 18 or 19 years old.⁶³ Thirty-two of the 59 were African Americans, 22 of whom were executed for crimes involving white victims.⁶⁴

In other words, some 15 per cent (72) of the 486 prisoners put to death in Texas since 1982 were teenagers (17, 18 or 19 years old) at the time of the crimes for which they were sentenced to death. Of these individuals, 40 were African American (56 per cent). And of these 40 African American teenaged offenders, 28 (70 per cent) were executed for crimes involving white victims.⁶⁵ Including Anthony Haynes, there are at least 39 prisoners on death row in Texas for crimes committed when they were 18 or 19 years old.⁶⁶ Twenty-two of these 39 prisoners (55 per cent) are black.

‘THERE IS NO MITIGATION’

Youth may be understood to mitigate by reducing a defendant's moral culpability for the crime, for which emotional and cognitive immaturity and inexperience with life render him less responsible, and youthfulness may also be seen as mitigating just because it is transitory, indicating that the defendant is less likely to be dangerous in the future
US Supreme Court Justice David Souter, 1993⁶⁷

Because Anthony Haynes had no prior criminal record when he shot Kent Kincaid, the prosecution emphasised the events immediately preceding the shooting in support of a finding of “future dangerousness”. It should be noted that the state was here using evidence of robbery and attempted robbery, for which Anthony Haynes had not been convicted, in seeking to obtain a death sentence.

A dozen years before his trial, two US Supreme Court Justices had argued that the Court should review the constitutionality of the introduction of evidence of unadjudicated crimes at the sentencing phase of a capital trial. They noted that the use of such evidence by Texas “is particularly disturbing because Texas generally forbids the use of such evidence in sentencing determinations for non-capital crimes, reasoning that the evidence poses too great a danger of undue prejudice and confusion”. In other words, they wrote, Texas “singles out

capital defendants for less procedural protection. This diminution of safeguards for capital defendants only is both perverse and at odds with the decisions of this Court.”⁶⁸ In 2001, the Inter-American Commission on Human Rights called on the USA to prohibit “the introduction of evidence of unadjudicated crimes during the sentencing phase of capital trials.”⁶⁹ This has still not happened.

The state’s first witness at the sentencing phase of Anthony Haynes’s trial was the police officer who had obtained his statements after arrest. Two unedited versions of the statements were played to the jury. In the first Anthony Haynes admitted committing two robberies immediately before the shooting of Officer Kincaid. In the second tape, he mentioned a third robbery. On the tape, Anthony Haynes said that he had been afraid during the attempted robberies (during which no shots were fired, two of the victims ran away and the third handed over his wallet), and that such conduct was not in his nature. The man who had handed over his wallet was presented as a state witness, as was one of the other victims who had run away without handing anything over. The state then presented evidence that Anthony Haynes had an explosive temper in support of a finding of “future dangerousness” and a death sentence.

Once the state had presented its witnesses to support its case for the death penalty, it was the defence counsel’s turn to present evidence in support of a life sentence. According to Anthony Haynes’ current lawyer, who has represented him for some seven years for his federal appeals,

“Despite a wealth of mitigating evidence, and a huge number of witnesses who were eager to testify, the punishment phase was almost an afterthought [by the defence lawyers]. Many family members were never interviewed, and even when they volunteered to testify, their help was inexplicably refused. This failure was especially prejudicial, because the State’s case for Anthony’s probability of committing future acts of criminal violence was especially weak, as he had no prior arrests or police contacts of any kind. The almost complete lack of any indications of a high probability of his committing future acts of criminal violence can be seen by the State’s resort to minor disciplinary incidents in high school, amounting to verbal altercations, to bolster their case as to this special issue”.⁷⁰

At the sentencing, the defence presented a number of witnesses who briefly testified to Anthony Haynes’s good character and that he had been a good student. They included his father and two grandmothers, a chaplain who had come into contact with him while he was in pre-trial custody in Harris County Jail, and another chaplain who had met Anthony Haynes on a navy cadet program in 1997. Although his father referred in passing to the fact that his son had been diagnosed with Attention Deficit Hyperactivity Disorder as a child, and had displayed some psychological problems as a teenager and briefly been hospitalized for them, no expert mental health testimony was presented.

A clinical psychologist who has reviewed Anthony Haynes’ medical and other records concluded in 2005 that it was “a tragedy that this is a young man who appears to have fallen through the cracks with respect to proper diagnosis and follow up for his psychiatric symptoms” after he was hospitalized as a teenager. She concluded that it was “very likely” that Anthony Haynes suffered from a “major mood disorder and began to show symptoms of such a disorder in early adolescence”. She further concluded that the symptoms he had displayed, including auditory hallucinations and explosive outbursts, meant that such information should have been introduced by a mental health expert at trial in mitigation.⁷¹ She said that “the presence of an untreated manic-depressive or bipolar illness could have certainly contributed to impair Mr Haynes’ judgment and volitional capacity at the time of the offense”.⁷²

In his 2005 report cited above, Dr Mark Cunningham concluded that the “failure of the defense to discover and develop” mitigating information that was “potentially critically

important” stemmed from the “11th hour nature” of the defence lawyers’ investigation into their client’s background.

“Mr Haynes’ defense failed to adequately investigate Anthony’s background, identify and explore the numerous damaging developmental factors apparent in that background, or articulate these factors and the supporting evidence. By failing to identify and provide evidence of such factors, the defense effectively put almost no mitigation before the jury.”⁷³

This failure, Dr Cunningham concluded, meant it was

“not surprising that the State advised the jury that Anthony’s conduct was simply ‘merciless’, ‘predatory’, and ‘cold-blooded’. Similarly, it is not surprising that the jury would find Anthony’s level of moral culpability to be death-worthy”.

Despite the fact that Anthony Haynes was only 19 years old at the time of the crime, Dr Cunningham noted that no expert evidence was presented on the mitigating effects of youth:

“Anthony’s teenage status at the time of the capital offense is critically important to considerations of his moral culpability, and hence his death worthiness. Unfortunately, there was no evidence presented at sentencing regarding the implications of his developmental immaturity. Adolescent immaturity has a clear neuro-developmental basis. To explain, brain development of the frontal lobes continues into the early 20s... Executive functions associated with frontal lobe functioning include insight, judgment, impulse control, frustration tolerance, recognition and appreciation of the emotional reaction of others, and recognition of consequences. Significant age related growth in these capabilities, conventionally referred to as ‘maturing’ or ‘growing up’, occurs between the ages of 19 and 22 in all individuals... All 19 year olds are thus ‘immature’ in brain development and in relation to adults. This neurological immaturity is reflected in limitations in psychological functioning and behavioral control, and accounts for the poor decision-making and poor impulse control often observed in adolescents, even in their late teens”.

A decade before the trial, four Supreme Court Justices had noted that “age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person’s maturity and responsibility, given the different developmental rates of individuals”, and “it is in fact a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s.”⁷⁴ Since then, scientific research has continued to show that development of the brain and psychological and emotional maturation continues at least into a person’s early 20s.

In 1993, in the case of a Texas death row prisoner who was 19 at the time of the crime, the Supreme Court emphasised that:

“youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults, and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions... [T]he signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”⁷⁵

In 2005, in *Roper v. Simmons*, the US Supreme Court finally outlawed the use of the death penalty against defendants who were under 18 years old at the time of the crime. The *Roper* ruling recognized the immaturity, impulsiveness, poor judgment and underdeveloped sense of responsibility often associated with youth. It also recognized that while it was coming up with a categorical rule – one that reflects international law – the age of 18 as a cut-off for death

eligibility is a *minimum* standard. While making the age of 18 “the line for which death eligibility ought to rest”, the Court noted that the “qualities that distinguish juveniles from adults do not disappear when an individual turns 18”.

In his assessment of the case, Dr Cunningham concluded that:

“Beyond the typical immaturity in cognitive capability, judgment, impulse control, modulation of emotion, and moral development, there is reason to believe that Anthony was even more psychologically immature at age 19 than most of his age mates.”⁷⁶

The last witness to be put on the stand at the sentencing was Kent Kincaid’s widow. She was presented as a “rebuttal” witness by the prosecution, to present “victim impact” testimony, over the objection of the defence. In 1987, the US Supreme Court had ruled that victim impact testimony in capital cases was unconstitutional: “Such information is irrelevant to a capital sentencing decision... One can understand the grief and anger of the family... [b]ut the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.”⁷⁷ Four years later, however, the Supreme Court overturned this ruling (two Justices from the 1987 majority having retired in the meantime).⁷⁸ A strongly worded dissent warned that the inclusion of victim impact testimony would introduce evidence that “sheds no light on the defendant’s guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favour of death rather than life on the basis of their emotions rather than their reason”.

Kent Kincaid’s widow testified that she had had a strong relationship with her husband with whom she had been married for 18 years; that he was a kind person who was widely liked; that he had had a close relationship with their two young daughters and described their incomprehension and devastation caused by the loss of their father. She testified how the family had depended on him, and that she had had to take a full-time job as a result of her husband’s death.

After this testimony, the defence and prosecution made their closing arguments. As noted, above, it was at this stage that the prosecutor suggested to the jury that their lives were going to be forever changed as a result of this trial – that they would forever be fearful if a stranger asked them directions. It was the defence objections to this line of argument, on the grounds that the prosecutor was “personalizing with the jury” and employing “improper” argument, which culminated in the judge threatening to have the defence lawyer removed from the courtroom.

In his arguments, the prosecutor suggested to the jury that there was no reason not to pass a death sentence:

“The evidence is also clear that there is no mitigation. The fact that he has had every opportunity in life and still did what he did to Sergeant Kent Kincaid, the fact that he had loving parents who never, even to this day, have not abandoned him, is that mitigation? The fact that he had loving and caring grandparents, is that mitigation? ...Is there anything that you see that mitigates against this. I suggest to you not. What does the defense bring to show, to suggest that there’s mitigation? A bunch of little awards, diplomas, certificates from elementary school that’s supposed to be mitigating?”

The jury retired to answer the two “special issues”:

1. Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Anthony Cardell Haynes, would commit criminal acts of violence that would constitute a continuing threat to society?
2. Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and

background, and the personal moral culpability of the defendant, Anthony Cardell Haynes, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

On 24 September 1999, the jury voted 'yes' to the future dangerousness question and 'no' to the mitigation question. Judge James Wallace sentenced Anthony Haynes to death.

After the trial, a defence investigator interviewed a number of the jurors. She said that the jury foreperson told her that the jurors' discussion of the second "special issue" had begun "late in the day" and that they had "misinterpreted" it. They had apparently interpreted it "to exclude from their consideration anything that did not reduce the defendant's moral blameworthiness for the crime itself, including evidence that they would otherwise have considered as mitigating".⁷⁹

Half a century ago, the American Law Institute (ALI) issued its Model Penal Code, section 210.6 of which sought to provide legislators in states which decided to retain the death penalty with rules aimed at maximizing fairness and reliability in capital sentencing. The 1976 *Gregg* ruling cited provisions of §210.6 in giving the go-ahead for executions to resume. Thirty-three years later, in 2009, ALI voted to withdraw §210.6 "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment".⁸⁰ In assessing whether to withdraw §210.6, ALI had considered, among other things, the inadequacies of the Supreme Court's regulation of the death penalty and of federal habeas corpus review generally, the politicization of the death penalty, racial discrimination, and systemic juror confusion in capital cases.

On the question of juror confusion, the expert report ALI used to inform its decision pointed to empirical evidence, largely developed by the Capital Jury Project (CJP), a research effort that has collected data from more than a thousand capital jurors. The report noted that "dozens of scholarly articles have been published based on CJP data, and much of the research has documented the failure of jurors to understand the guidance embodied in the sentencing instructions and verdict forms they receive." Among other things, the research pointed to "endemic flaws in jury decision-making, such as the propensity of jurors to decide punishment during the guilt-innocence phase of the trial, their frequent misapprehension of the standards governing their consideration of mitigating evidence, and their general moral disengagement from the death penalty decision".⁸¹

In addition to the post-trial indication by the foreperson on Anthony Haynes's jury that the jurors had been confused about the mitigation instruction, prior to the trial the following dialogue had occurred at jury selection between one of the prospective jurors and the defence lawyer on the subject of the "future dangerousness" question the jury would later be asked:

Defence: Now, Mrs Nelson, when you look at that word probability in the first special issue, does probability seem to say the same things as possibility or chance? Or do you think probability requires them to show more.

Juror: I associate probability with possible

Defence: Okay. You think probability means the same thing as possibility?

Juror: Yes.

Defence: Okay. You don't see any distinction between the two?

Juror: No.

This individual, who would apparently apply the future dangerousness "special issue" in such a way as to vote for a death sentence if there was evidence that there was *any* chance that the defendant would commit acts of violence in the future, was picked to sit on the jury. In

2007, the US District Court said that the juror had “showed some confusion” on the meaning of “probability” when questioned during jury selection. However, because the defence lawyers had failed to further question her, the “meagre record” on this issue did not prove that she was not an impartial juror.

FINAL APPEAL TO THE COURTS AND FOR EXECUTIVE CLEMENCY

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt
US Supreme Court, 1925⁸²

On 24 September 2012, Anthony Haynes’ lawyer filed a motion in the US District Court seeking a stay of execution. An accompanying petition for relief centres on the question of his legal representation at the 1999 trial and the performance of the lawyer who filed his subsequent state habeas corpus petition. It argues that, under a recent Supreme Court ruling, Anthony Haynes should be allowed back into federal court on this issue.

As described above, the Harris County jury which convicted Anthony Haynes of capital murder heard little mitigating evidence about the young man they were then being asked by the state to send to death row. After the trial, the conviction and sentence went for “direct” appeal to the Texas Court of Criminal Appeals which is mandatory, and for habeas corpus review by the state courts which the prisoner can choose to pursue.

In a direct appeal, only issues in the trial record itself are addressed. Matters outside the trial record – such as the withholding of evidence by the prosecutor or the failure of the defence lawyer to present particular evidence – are supposed to be presented via the state habeas corpus appeal. The habeas appeal lawyer must therefore conduct a thorough investigation of the inmate’s case. According to Anthony Haynes’s current lawyer, the state habeas corpus petition in his case “reveals absolutely no evidence of any investigation, as all claims are record-based”. The state lawyer who represented Anthony Haynes for his state habeas challenge was subsequently singled out as one of those “sloppy lawyers failing clients on death row” in Texas in a study conducted by the *Austin American-Statesman* newspaper.⁸³ This lawyer was found in this review to have submitted a number of habeas corpus petitions in which he had “copied largely verbatim” from the prisoner’s “direct appeal”. In Anthony Haynes’s case, the petition recently filed in District Court asserts that this lawyer’s “representation would not even have been minimally sufficient for *direct appeal* counsel, let alone the statutory duties or the applicable professional standards for Texas capital *habeas corpus* counsel” (emphasis in original).⁸⁴

The failure of Anthony Haynes’ court-appointed habeas corpus lawyer to raise in state court the claim of inadequate legal representation at trial meant that it was “procedurally defaulted”, that is barred, from federal judicial review. However, in March 2012 the US Supreme Court issued a ruling, *Martinez v. Ryan*, that “where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective”.⁸⁵ The scope of this ruling has yet to be determined. The petition filed in US District Court in September 2012 asks the court, in light of *Martinez*, to reverse its prior judgment handed down in 2007 that Anthony Haynes’ claim was procedurally defaulted and to now review the claim that he was provided inadequate assistance of legal counsel at his 1999 sentencing when his trial lawyer failed to present the jury with “a case for life”.

Accompanying the petition to the District Court are the signed statements from more than

three dozen people asserting that the crime was far out of character for a person they knew as non-violent and respectful. Many have stated that they were available and willing to testify at the trial but were not contacted by the defence.

The motion was pending before the District Court at the time of writing. Also pending is the clemency petition before the Texas Board of Pardons and Paroles and Governor Rick Perry seeking commutation of Anthony Haynes' death sentence.

In 1978, the US Supreme Court issued a landmark ruling on the need for capital sentencing to be based on individualized information relating not just to the crime, but to the offender, given the irrevocability of the death sentence:

“Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. A variety of flexible techniques – probation, parole, work furloughs, to name a few – and various post-conviction remedies may be available to modify an initial sentence of confinement in non-capital cases. The non-availability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.”⁸⁶

Texas is set once again to carry out an irrevocable penalty against an individual for whom the theory of individualized sentencing remained theoretical because the trial jury never heard anything like the full mitigating evidence that was available. In 2001 Governor Perry stated:

“I will continue to review each capital punishment case brought before me to ensure that due process has been served. We have a good system that relies on the valiant efforts of dedicated prosecutors and thoughtful jurists. Decisions are made by juries of 12 citizens.”⁸⁷

Since he said that, there have been nearly 250 executions in Texas, more than twice as many executions in just over a decade than have occurred in any state since 1977. Now, 50 days before the 30th anniversary of resumption of executions in Texas following the *Gregg v. Georgia* ruling, the state is scheduled to execute Anthony Haynes.

The leading role of Texas in retention of the death penalty in the USA has become even starker in recent years. Four states – New Jersey (2007), New Mexico (2009), Illinois (2010) and Connecticut (2012) – have legislated to abolish capital punishment, in addition to the demise of the death penalty in New York State.⁸⁸ Coming on top of a two-thirds reduction in annual death sentences in the USA since the mid-1990s, a halving in the annual judicial death toll since 1999, and the removal by the US Supreme court during the past decade of under 18-year-olds and people with certain mental disabilities from the reach of the executioner (Texas led such executions prior to the rulings), such legislative activity appears to be part of a cooling in the USA's relationship with the death penalty compared to earlier decades. Texas should rethink its attachment to judicial killing.








Amnesty International opposes the death penalty unconditionally, in every case, regardless of questions of guilt, innocence, remorse or rehabilitation, the details of the crime, or the method chosen by the state to kill the prisoner.

The organization urges the Texas Board of Pardons and Paroles and Governor Rick Perry to grant clemency to Anthony Haynes and to support a moratorium on executions as a step towards abolition in their state.

PLEASE TAKE ACTION

Please appeal to the authorities in Texas to stop the execution of Anthony Haynes. See Amnesty International Urgent Action, at <http://www.amnesty.org/en/library/info/AMR51/078/2012/en>

A SELECTION OF RECENT REPORTS

-  USA: Deadly formula: An international perspective on the 40th anniversary of *Furman v. Georgia*, 28 June 2012, <http://www.amnesty.org/en/library/info/AMR51/050/2012/en>
-  USA: Senseless killing after senseless killing: Texas inmate with mental disability claim facing execution for murder committed as teenager, 7 June 2012, <http://www.amnesty.org/en/library/info/AMR51/042/2012/en>
-  USA: Another brick from the wall: Connecticut abolishes death penalty, and North Carolina judge issues landmark race ruling, as momentum against capital punishment continues, 27 April 2012, <http://www.amnesty.org/en/library/info/AMR51/028/2012/en>
-  USA: An embarrassment of hitches: Reflections on the death penalty, 35 years after *Gregg v. Georgia*, as states scramble for lethal injection drugs, July 2011, <http://www.amnesty.org/en/library/info/AMR51/058/2011/en>
-  USA: People can change. Will Texas? After three decades on death row, clemency sought on rehabilitation grounds, 3 June 2010, <http://www.amnesty.org/en/library/info/AMR51/048/2010/en>
-  USA: Model criminal justice? Death by prosecutorial misconduct and a 'stacked' jury, 11 May 2010, <http://www.amnesty.org/en/library/info/AMR51/030/2010/en>
-  USA: Too much cruelty, too little clemency: Texas nears 200th execution under current governor, 30 April 2009, <http://www.amnesty.org/en/library/info/AMR51/057/2009/en>

ENDNOTES

¹ *Haynes v. Dretke*, Respondent Dretke's answer with brief in support, In the US District Court for the Southern District of Texas, 22 May 2006.

² See *Roper v. Simmons* (2005).

³ The post-9/11 "one percent doctrine" is attributed to former Vice President Dick Cheney. See Ron Suskind, *The one percent doctrine*. Simon and Schuster, 2006, page 62. "If there was even a one percent chance of terrorists getting a weapon of mass destruction...the United States must act as if it were a certainty".

⁴ Fourth Periodic Report of the USA to the UN Human Rights Committee, 30 December 2011, <http://www.state.gov/j/drl/rls/179781.htm>

⁵ (Excluding the rest of Texas) the 10 states are Alabama, Arizona, California, Florida, Georgia, Illinois, North Carolina, Ohio, Oklahoma and Pennsylvania. Illinois is now abolitionist.

⁶ See <http://app.dao.hctx.net/OurOffice/JudgeLykos.aspx>

⁷ Connecticut, Illinois, New Jersey, New York and New Mexico have now abolished the death penalty.

⁸ Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and District of Columbia remained abolitionist after *Furman*.

⁹ Initially, Anthony Haynes' family retained a lawyer, but discovered they could not afford the fees. At

this point the court appointed another lawyer, and appointed the original lawyer as co-counsel.

¹⁰ Statement by Robert Black, spokesman for Texas Governor Rick Perry, concerning the European Union's appeal that Texas enact a moratorium on the death penalty, 21 August 2007, <http://governor.state.tx.us/news/press-release/129/>

¹¹ See Gov. Rick Perry Meets with the President of Mexico Vicente Fox, 5 November 2003, <http://governor.state.tx.us/news/speech/10444/>.

¹² See, for instance, Los Tocayos Carlos, *Columbia Human Rights Law Review*, Volume 43, No. 3, Summer 2012, at <http://www3.law.columbia.edu/hrlr/lrc/chapter/foreword/1.html> (Study providing evidence that on 7 December 1989 Texas executed Carlos De Luna for a crime he did not commit).

¹³ 4 March 2010, <http://governor.state.tx.us/news/press-release/14317/>

¹⁴ Attorney General response, 5 March 2010, <https://www.oag.state.tx.us/oagNews/release.php?id=3237>

¹⁵ Court withdraws ruling in death penalty case, Office of the Harris County District Attorney, 9 March 2010, <http://app.dao.hctx.net/Article/113/Court-Withdraws-Ruling-in-Death-Penalty-Case.aspx>

¹⁶ *State of Texas Ex Rel. Patricia R. Lykos v. The Honorable Kevin Fine*, Texas Court of Criminal Appeals, 12 January 2011.

¹⁷ TCCA Ruling Sides with DA; Death Penalty Hearing Ends, 12 January 2011, <http://app.dao.hctx.net/Article/144/TCCA-Ruling-Sides-with-DA-Death-Penalty-Hearing-Ends.aspx>

¹⁸ Gov. Perry signs life without parole bill, 17 June 2005 <http://governor.state.tx.us/news/press-release/3603/>

¹⁹ See Texas ends 'last meals' for death row inmates, Los Angeles Times, 23 September 2011.

²⁰ US report to the UN Human Rights Council for Universal Periodic Review process. UN Doc: A/HRC/WG.6/9/USA/1, 23 August 2010.

²¹ *Callins v. Collins*, Justice Blackmun dissenting from denial of certiorari, 22 February 1994.

²² *Baze v. Rees*, US Supreme Court, 16 April 2008, Justice Stevens concurring in the judgment.

²³ Remarks of Governor Rick Perry to the Texas Broadcasters Association, 17 January 2001, <http://governor.state.tx.us/news/speech/5553/>

²⁴ *Olmstead v US*, 277 U.S. 438 (1928), Justice Brandeis, dissenting.

²⁵ *Gregg v. Georgia*, 428 U.S. 153, 2 July 1976. See also, for example, Finkenauer, J.O., Public support for the death penalty: Retribution as just deserts or retribution as revenge? *Justice Quarterly*, Vol. 5, No. 1, 1988 (“...maybe even the Supreme Court majority in the *Gregg* decision probably would reject revenge as a sound basis for determining public policy. Yet doing so simply by concluding that retribution is just deserts (not revenge) and that this is really what the public wants does not make that interpretation valid and therefore acceptable. Is this kind of misconstrued public opinion a good foundation for public policy? It certainly seems not.”)

²⁶ See USA: Deadly formula: An international perspective on the 40th anniversary of *Furman v. Georgia*, 28 June 2012, <http://www.amnesty.org/en/library/info/AMR51/050/2012/en>;

²⁷ *Gregg v. Georgia*, *op. cit.* See also USA: An embarrassment of hitches: Reflections on the death penalty, 35 years after *Gregg v. Georgia*, as states scramble for lethal injection drugs, 1 July 2011, <http://www.amnesty.org/en/library/info/AMR51/058/2011/en>

²⁸ The revised Texas Penal Code of 1974 limited capital murder to five situations: murder of a peace officer or fireman; murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape

from a penal institution; and murder committed by a prison inmate when the victim is a prison employee.

²⁹ *Jurek v. Texas. Gregg v. Georgia* was one of five death penalty cases initially defining the contours of post-*Furman* capital justice in the USA, along with *Jurek v. Texas*, *Roberts v. Louisiana*, *Proffitt v. Florida*, and *Woodson v. North Carolina*.

³⁰ *Penry v. Lynaugh*, 1989. See USA: Beyond Reason - The imminent execution of John Paul Penry, 1 December 1999, <http://www.amnesty.org/en/library/info/AMR51/195/1999>

³¹ *Haynes v. Dretke*, Respondent Dretke's answer with brief in support. In the US District Court for the Southern District of Texas, 22 May 2006.

³² See USA: Too much cruelty, too little clemency: Texas nears 200th execution under current governor, 30 April 2009, <http://www.amnesty.org/en/library/info/AMR51/057/2009/en>

³³ *Baze v. Rees*, 16 April 2008, Justice Stevens concurring in the judgment.

³⁴ Robert Carter, sentenced in Harris County, was executed on 18 May 1998 for a crime committed when he was 17. Pedro Muniz was executed on 19 May 1998 for a crime committed when he was 20.

³⁵ *Furman v. Georgia*, Justice Brennan concurring.

³⁶ Declaration of L.H., 30 June 2005.

³⁷ Affidavit of Seth W. Silverman, M.D., 13 September 2005.

³⁸ Why Florida should abolish the death penalty. By Senior Judge Charles M. Harris, The Gainesville Sun, 18 April 2012, <http://www.gainesville.com/article/20120418/OPINION/120419608/1109/>

³⁹ UN Guidelines on the Role of Prosecutors, 1990.

⁴⁰ *Gardner v. Florida*, 430 U.S. 349 (1977)

⁴¹ Summaries of public sanctions (1 September 1999 to 31 August 2003). Texas State Commission on Judicial Conduct. <http://www.scjc.state.tx.us/pdf/actions/FY2000-2003PUB-SANC-SUMM.pdf>

⁴² *Haynes v. Dretke*, Respondent Dretke's answer with brief in support, In the US District Court for the Southern District of Texas, 22 May 2006.

⁴³ One was originally charged in relation to the shooting of Kent Kincaid, but the charges were dismissed after he testified against Haynes at trial. The other, who was a juvenile at the time, was never charged.

⁴⁴ In fact, the "Investigator Report" of the Harris County Medical Examiner had noted that Kent Kincaid was off duty at the time of the shooting, and the TCCA would later hold that "the record establishes that Sergeant Kincaid was a Houston police officer and that he was off-duty at the time of his death". *Haynes v. State*. Court of Criminal Appeals of Texas, 10 October 2001.

⁴⁵ Declaration of P.D., 23 June 2005.

⁴⁶ Declaration of R.H., 8 September 2005.

⁴⁷ Declaration of R.R., 3 August 2005.

⁴⁸ Declaration of D.L.M., 15 June 2005.

⁴⁹ Declaration of L.B., 8 August 2005.

⁵⁰ Declaration of T.T., 8 September 2005.

⁵¹ Declaration of T.D., 13 September 2005.

⁵² *Baze v. Rees*, 20 October 2008, Justice Stevens, concurring in judgment.

⁵³ *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

⁵⁴ *Wainwright v. Witt*, 469 U.S. 412 (1985). In 1992, in *Morgan v. Illinois*, the Court extended the *Witt* standard to include execution proponents - anyone whose support for the death penalty would “prevent or substantially impair” them from performing their duties as a juror can be dismissed for cause.

⁵⁵ *Gray v. Mississippi*, 481 U.S. 648 (1987).

⁵⁶ *Lockhart v. McCree*, 476 U.S. 162 (1986).

⁵⁷ *Ibid.* Justices Marshall, Brennan and Stevens, dissenting. In 1998, a review of the existing research indicated that a “favourable attitude towards the death penalty translates into a 44 per cent increase in the probability of a juror favouring conviction”. Allen, Mabry and McKelton, *Impact of juror attitudes about the death penalty on juror evaluations of guilt and punishment: A meta-analysis*. Law and Human Behaviour, Volume 22, No. 6, 1998, pages 715 to 731. Another review in 1998 concluded that the research revealed “a deep chasm between the law’s intentions and the result of death qualification in practice. Rather than ensuring impartiality, the result can more accurately be envisioned as a stacked deck against the defendant: death-qualified jurors, regardless of the standard, are more conviction-prone, less concerned with due process, and they are more inclined to believe the prosecution than are excludable jurors.” Marla Sandys, *Stacking the deck for guilt and death: The failure of death qualification to ensure impartiality*. In: America’s experiment with capital punishment. Edited by Acker, Bohm and Lanier. Carolina Academic Press, 1998.

⁵⁸ *Ex parte Anthony Cardell Haynes*, In the 263rd Judicial District Court for Harris County, Texas. Sworn affidavit. 12 December 2000.

⁵⁹ *Texas v. Haynes*, In the District Court of Harris County, 263rd Judicial District, Affidavit of Alvin E. Nunnery, 15 October 1999.

⁶⁰ *Batson v. Kentucky*, 79 U.S. 476 (1986).

⁶¹ *Wilkerson v Texas*, 493, U.S. 924 (1990), Justice Marshall dissenting from denial of *certiorari*.

⁶² Charles Rumbaugh, Jay Pinkerton, Johnny Garrett, Curtis Harris, Ruben Cantu, Joseph Cannon, Robert Carter, Glenn McGinnis, Gary Graham, Gerald Mitchell, Napoleon Beazley, T.J. Jones, Toronto Patterson.

⁶³ Beunka Adams (19 at crime / executed 2012); Milton Mathis (19 / 2011); Michael Hall (18 / 2011); Michael Perry (19 / 2010); Peter Cantu (18 / 2010); George Jones (19 / 2010); Reginald Blanton (18 / 2009); Derrick Johnson (18 / 2009); Willie Pondexter (19 / 2009); Joseph Ries (19 / 2008); José Medellin (18 / 2008); Carlton Turner (19 / 2008); John Amador (18 / 2007); DaRoyce Mosley (19 / 2007); Kenneth Parr (18 / 2007); Joseph Nichols (19 / 2007); Ryan Dickson (18 / 2007); Vincent Gutierrez (18 / 2007); Willie Shannon (19 / 2006); Justin Fuller (18 / 2006); Derrick O’Brien (18 / 2006); Jermaine Herron (18 / 2006); Clyde Smith (18 / 2006); Troy Kunkle (18 / 2005); Ronald Howard (18 / 2005); Robert Shields (19 / 2005); Demarco McCullum (19 / 2004); Dominique Green (18 / 2004); Edward Green (18 / 2004); Jasen Busby (19 / 2004); Kenneth Bruce (19 / 2004); Cedric Ransom (18 / 2003); Henry Dunn (19 / 2003); Granville Riddle (19 / 2003); Javier Suárez Medina (19 / 2002); Reginald Reeves (19 / 2002); Monty Delk (19 / 2002); Emerson Rudd (18 / 2001); Jeffery Dillingham (19 / 2000); Juan Soria (18 / 2000); Jessy San Miguel (19 / 2000); James Richardson (19 / 2000); Ponchai Wilkerson (19 / 2000); Jose de la Cruz (19 / 1999); George Cordova (19 / 1999); David Castillo (19 / 1998); Irineo Montoya (18 / 1997); Davis Losada (19 / 1997); Dorsie Johnson (19 / 1997); Fletcher Mann (19 / 1995); Jeffery Motley (19 / 1995); Clifton Russell (19 / 1995); Warren Bridge (19 / 1994); Walter Williams (19 / 1994); Richard Wilkerson (19 / 1993); Danny Harris (19 / 1993); Jesus Romero (19 / 1992); Billy White (18 / 1992); Anthony Williams (19 / 1987).

⁶⁴ Thirteen were Latinos and 14 were white. Forty of the 58 cases, or 69 per cent, involved white victims. Six cases involved black victims and 11 cases involved Latino victims.

⁶⁵ There have been no white teenaged offenders executed for crimes involving blacks in Texas since 1982. Of the 486 executions carried out in Texas between 1982 and 3 October 2012, three were of

white men for killing solely a black person. Lee Taylor and Lawrence Brewer were executed in 2011, and Cleve Foster in 2012, each for the murder of an African American. In 2003, another white man, Larry Hayes, was executed for killing a black person. He was also convicted of the murder of a white victim.

⁶⁶ Cortne Robinson (18 at crime); Blaine Milam (18); James Brodnax (19); Christian Olsen (19); Dexter Johnson (18); LeJames Norman (19); Juan Ramirez (18); Anthony Doyle (18); Damon Matthews (18); Richard Cobb (18); Charles Derrick (18); Clinton Young (18); Irving Davis (18); Perry Williams (19); Miguel Paredes (18); Obie Weathers (18); Larry Estrada (18); Alvin Braziel (18); Robert Woodard (19); Juan Garcia (18); Ray Jasper (19); Anthony Haynes (19); Richard Vasquez (18); Felix Rocha (18); Julius Murphy (18); Howard Guidry (18) Jose Martinez (18); Pablo Melendez (18); Erica Shepphard (19); Billy Wardlow (18); Tony Ford (18); Randolph Greer (18); Robert Campbell (18); Kim Ly Lim (19); Bobby Hines (19); Gustavo Garcia (18); Brent Brewer (19); Marlin Nelson (19); Harvey Earvin (18).

⁶⁷ *Graham v. Collins* (1993), Justice Souter dissenting.

⁶⁸ *Williams v. Lynaugh*, 484 U.S. 935, Justices Marshall and Brennan dissenting from denial of certiorari, 2 November 1987.

⁶⁹ Report N° 52/01, Case 12.243. Juan Raul Garza, United States, 4 April 2001.

⁷⁰ *Haynes v. Thaler*, Motion for relief from judgment pursuant to federal rule of civil procedure 60(b)(6), In the US District Court for the Southern District of Texas, 24 September 2012.

⁷¹ Re: Anthony Haynes. Letter from Susana A. Roisin, PhD., 28 June 2005.

⁷² Re: Haynes, Anthony Cardell. Letter from Susana A. Roisin, PhD., 13 July 2005.

⁷³ Declaration of Mark D. Cunningham. Re: Anthony Cardell Haynes. 2005.

⁷⁴ *Stanford v. Kentucky* (1989), Justice Brennan dissenting (& Justices Marshall, Blackmun, Stevens).

⁷⁵ *Johnson v. Texas* (1993).

⁷⁶ Declaration of Mark D. Cunningham. Re: Anthony Cardell Haynes. 2005.

⁷⁷ *Booth v. Maryland* (1987).

⁷⁸ *Payne v. Tennessee* (1991).

⁷⁹ *Texas v. Haynes*. In the District Court of Harris County, Texas, 263rd Judicial District, Affidavit of Cynthia Patterson, 20 October 1999.

⁸⁰ Report of the Council to the Membership of the ALI on the matter of the death penalty, April 2009.

⁸¹ Report to the ALI concerning capital punishment, November 2008, page 32.

⁸² *Ex parte Grossman*, 267 U.S. 87, 2 March 1925.

⁸³ Sloppy lawyers failing clients on death row, Austin American-Statesman, 29 October 2006.

⁸⁴ *Haynes v. Thaler*, Motion for relief, 24 September 2012, *op.cit.*

⁸⁵ *Martinez v. Ryan*, 20 March 2012.

⁸⁶ *Lockett v. Ohio*, 438 U.S. 586 (3 July 1978).

⁸⁷ Remarks of Governor Rick Perry to the Texas Broadcasters Association, 17 January 2001, <http://governor.state.tx.us/news/speech/5553/>

⁸⁸ In 2004 in New York State, the death penalty was declared unconstitutional under the state constitution. In 2007, its last death sentence was commuted.